(4)

No. 91-2045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

R. GORDON DARBY, *et al.*,
Petitioners,

v.

JACK KEMP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Can a federal appeals court impose an exhaustion requirement as a "rule of judicial administration" notwithstanding Section 10(c) of the Administrative Procedure Act and thereby foreclose judicial review of final adverse agency action, based upon a litigant's failure to pursue a permissive administrative appeal that is not required by statute or agency regulation?

LIST OF PARTIES

The petitioners are R. Gordon Darby; Darby Development Company; Darby Realty Company; Darby Management Company, Incorporated; MD Investment; Parkbrook Acres Associates; and Parkbrook Developers.* Respondents are Jack Kemp, Secretary of Housing and Urban Development; Arthur J. Hill, Assistant Secretary for Housing/FHA Commissioner; the United States Department of Housing and Urban Development; and the United States of America.

* Pursuant to Supreme Court Rule 29.1, petitioners state that there are no parent companies or subsidiaries of petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1a-7a) is reported at 957 F.2d 145. The orders of the district court (Pet. Apps. B, C, pp. 8a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1992. A petition for rehearing with a suggestion for rehearing in banc was denied on March 20, 1992 (Pet. App. F at 93a). The petition for a writ of certiorari was filed on June 18, 1992 and was granted on November 2, 1992. The jurisdiction of the Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, entitled "Actions Reviewable," provides in pertinent part:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the section meanwhile is inoperative, for an appeal to superior agency authority.

STATEMENT OF THE CASE

This is a suit seeking declaratory and injunctive relief from administrative sanctions imposed upon petitioners—Mr. Darby and his affiliates (hereafter, collectively, "Mr. Darby")—by the United States Department of Housing and Urban Development ("HUD"). Respondents (hereafter, "HUD" or the "government") moved to dismiss the suit for failure to exhaust administrative remedies. The district court denied this motion and proceeded to grant relief to Mr. Darby, holding that HUD's sanctions were not rationally supported by the facts and had been imposed for forbidden punitive purposes. The court of appeals reversed, ruling that Mr. Darby had failed to exhaust all available administrative remedies.

Petitioner Robert Gordon Darby is a respected South Carolina real estate developer. In 1982 and early 1983, he financed several housing projects pursuant to a complex plan predicated upon securing HUD single family mortgage insurance for those properties.[1] This financing

[1] The details of this financing plan are not relevant to the issues presented in this appeal. Those details were reviewed by the district court in its order granting relief to Mr. Darby. (Pet. App. at 9a-12a). Previously, they were recounted at even greater length by the HUD Administrative Law Judge in his initial decision and order. (Pet. App. D at 44a-61a).

plan had been devised in 1981 by a reputable mortgage banker, with whom Mr. Darby had done business for many years. After discussing the plan with HUD and being advised that it complied with relevant HUD requirements, the banker utilized it to finance a number of projects in which he was involved. The banker explained the financing plan to Mr. Darby and helped him to use it. (Pet. App. B at 9a-12a; Pet. App. D at 55a-61a).

Subsequently, in September 1983, HUD deemed this financing plan unacceptable on the grounds that it circumvented applicable regulations. Before HUD halted its use, over a thousand properties in South Carolina had been financed pursuant to this plan. Mr. Darby's properties were only a small fraction of this total. (Pet. App. B at 11a-12a)

Several years later, due to economic circumstances beyond the control of the developers, virtually all of the mortgage loans financed pursuant to this plan went into default. Despite "Herculean efforts" on Mr. Darby's part to resolve the problems and save his projects from financial downfall, his loans defaulted too.[2] These defaults caused HUD to pay substantial mortgage insurance claims to the lenders holding the defaulted loans. (Pet. App. B at 12a).

This insurance loss led to an investigation of the financing plan. A HUD audit conducted in 1986 concluded that there had been no wrongdoing on the part of anyone, including Mr. Darby, and that HUD had not been misled in any way. (Pet. App. B at 12a-13a). Nonetheless, in 1989 HUD instituted administrative sanctions against Mr. Darby for having used this financing plan.[3]

[2] The description of Mr. Darby's efforts as "Herculean" was coined by the HUD Administrative Law Judge and repeated by the district court.

[3] HUD's regulations governing the imposition of administrative sanctions appear at 24 C.F.R. pt. 24 (1990). The procedures con-

On June 19, 1989, HUD imposed a Limited Denial of Participation ("LDP") that prohibited Mr. Darby from taking part in certain HUD housing programs in South Carolina for one year. Mr. Darby unsuccessfully contested the issuance of this LDP at an administrative conference, and then initiated an administrative appeal on July 21, 1989. (Pet. App. B at 13a).

In a separate action, by notice dated August 23, 1989, the HUD Assistant Secretary for Housing proposed to debar Mr. Darby and his affiliates from participating in virtually all federal programs for a period of five years, because of his utilization of the financing plan.[4] The length of the proposed debarment subsequently was increased to an indefinite period. (Pet. App. B at 13a; Pet. App. D at 34a & n.1).

Under HUD's regulatory scheme, the initiation of these adminstrative sanctions caused Mr. Darby to be excluded immediately from participating in federal programs. This exclusion continued throughout the duration of the administrative proceedings in which Mr. Darby contested the sanctions.[5]

The LDP appeal and the debarment action were consolidated for hearing before a HUD administrative law judge ("ALJ"). A four-day evidentiary hearing was conducted in December 1989. (Pet. App. B at 13a).

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trolling hearings and appeals in such matters are set forth in §§ 24.313 and 24.314, and in 24 C.F.R. pt. 26.

[4] A person who is debarred may not participate in "covered transactions" in federal nonprocurement programs or in federal procurement activities. 24 C.F.R. §§ 24.105(f), 24.200 (1990).

[5] A LDP is effective immediately upon its issuance. 24 C.F.R. § 24.710(b) (1990). Furthermore, evidence that a cause for debarment may exist is itself a cause for suspension. 24 C.F.R. § 24.405 (a)(2) (1990). Thus, as is standard practice in such cases, Mr. Darby was suspended for the duration of the debarment proceedings against him once HUD issued the notice of proposed debarment.

On April 13, 1990, ten months after the administrative proceedings had commenced, the ALJ issued a lengthy written decision and order, which included detailed factual findings (Pet. App. D at 33a-90a). The ALJ upheld the LDP and concluded that Mr. Darby should be debarred for a period of 18 months. (Pet. App. B at 13a). The ALJ ruled that the financing plan was a sham which improperly circumvented applicable requirements and that Mr. Darby "cannot hide behind the fact that government employees approved the program when he, in the first instance, knew or should have known that it was improper." (Pet. App. D at 82a).

Neither Mr. Darby nor HUD sought discretionary intra-agency review of the ALJ's ruling pursuant to 24 C.F.R. § 24.314(c) (1990) which provides that:

> The hearing officer's determination shall be final unless . . . the Secretary . . . within 30 days of receipt of a request decides as a matter of discretion to review the finding of the hearing officer. . . . Any party may request such a review in writing within 15 days of receipt of the hearing officer's determination.

Accordingly, the ALJ's decision and order became HUD's final agency action.

Meanwhile, HUD's sanctions had been in effect throughout the pendency of the administrative proceedings. Ten months of the twelve-month LDP period and of the eighteen-month debarment period had already elapsed. At this point, Mr. Darby sought judicial redress. On May 31, 1990, Mr. Darby filed suit in the United States District Court for the District of South Carolina seeking injunctive and declaratory relief on the grounds that the administrative sanctions violated provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and due process rights guaranteed by the Fifth Amendment. (J.A. at 2-22). Simultaneously, Mr. Darby filed a motion for preliminary injunctive relief.

HUD moved to dismiss the suit for failure to exhaust administrative remedies because Mr. Darby had not petitioned for Secretarial review under 24 C.F.R. § 24.314(c) (1990). The district court denied this motion in an order filed on October 26, 1990. The court noted that neither HUD's regulation nor the APA expressly required exhaustion as a precondition to obtaining judicial review. Therefore, the court reasoned, it was guided by "the general rule at common law that administrative remedies must be exhausted prior to proceeding in court." Nonetheless, the district court concluded that there were several reasons why this rule should not be applied blindly to require exhaustion in this case. The first was that "a dismissal would leave the decision of the ALJ wholly unreviewed" because the time for an agency appeal had passed. Second, the administrative remedy was inadequate because the regulations gave the Secretary too much latitude in determining the time limits within which to issue a decision. Finally, the court found that resort to Secretarial review would have been futile (Pet. App. C at 27a-29a).

The district court proceeded to consider the suit on its merits. Although the court denied Mr. Darby's motion for a preliminary injunction, it ultimately granted his motion for summary judgment on April 10, 1991. The court vacated the administrative sanctions based upon its conclusion that "the debarment in this case was not rationally connected to the factual findings of the ALJ, and was further in conflict with the prohibition against imposing debarment for punitive reasons." (Pet. App. B at 17a).

On appeal to the Fourth Circuit, HUD challenged only the district court's ruling on exhaustion.[6] HUD contended

[6] Although HUD also noted an appeal of the district court's ultimate ruling that the debarment of Mr. Darby was arbitrary and unlawful, it subsequently abandoned that issue.

that its regulation, 24 C.F.R. § 24.314(c), *required* Mr. Darby to seek Secretarial review as a prerequisite to filing suit in federal court.[7] The circuit court rejected this contention, holding that the regulation "does not expressly mandate exhaustion of administrative remedies prior to filing suit." (Pet. App. A at 6a-7a). Nonetheless, the court held that, as a "rule of judicial administration," exhaustion is still required "even when a statute does not impose an explicit directive." (Pet. App. A at 4a).

Proceeding from this premise, the circuit court ruled as follows:

> In the absence of a statutory requirement of exhaustion, the district court properly turned to the judicial doctrine of exhaustion of administrative remedies and to possible avoidance of the rule by application of its exceptions. Our review, however, reveals that the facts do not warrant application of the exceptions. Therefore, the district court improperly denied the Secretary's motion to dismiss. We reverse and remand with instruction to dismiss Darby's complaint for failure to exhaust administrative remedies.

(Pet. App. A at 7a). The circuit court made no reference to Section 10(c) of the APA, although that statutory provision was prominently cited in Mr. Darby's brief and during oral argument.

The Fourth Circuit's ruling left Mr. Darby without any recourse since the fifteen-day period in April 1990 during which he could have requested discretionary Secretarial review had long since passed. However, the circuit court was unperturbed by this result.

> Yet Darby, by strategic decision or otherwise, allowed the filing period to pass. He cannot now complain that the decision is unreviewable.

(Pet. App. A at 6a).

[7] It was undisputed that there is no other statutory or regulatory exhaustion provision applicable to this case.

Mr. Darby petitioned for rehearing, with a suggestion for rehearing in banc, on the grounds that the court's decision contravened Section 10(c) and was in conflict with the decisions of other circuits which follow that statutory mandate. The Fourth Circuit denied this petition without opinion on March 20, 1992. (Pet. App. F at 93a).

SUMMARY OF ARGUMENT

The Fourth Circuit has created a novel and insupportable "rule of judicial administration" that any possible administrative appeal must be exhausted before judicial review may be sought under the APA, even though such exhaustion is not required by relevant statutes or regulations. This ruling amounts to a judicial repeal of Section 10(c) of the APA, in which Congress explicitly provided that a litigant seeking judicial review of a final agency action *need not exhaust* available administrative appeals *unless* such exhaustion is *expressly required by statute or agency rule.* 5 U.S.C. § 704.

The exhaustion doctrine is subordinate to Congress' constitutional authority to prescribe the jurisdiction of federal courts. *McCarthy v. Madigan*, —— U.S. ——, ——, 112 S.Ct. 1081, 1086 (1992). Congress has codified the exhaustion requirement for suits under the APA in Section 10(c) of that Act. *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). The plain language of Section 10(c), which is completely confirmed by its legislative history, provides that exhaustion of intra-agency appeals is not necessary except to the extent that other statutes or appropriate agency rules command otherwise. In this case, there is no such statute or agency rule. The circuit court deprived Mr. Darby of judicial relief from an arbitrary agency sanction based on a purported "rule of judicial administration" that flouts Section 10(c) of the APA.

The Fourth Circuit's decision conflicts with the decisions of other federal courts which have held, correctly,

that Section 10(c) controls the exhaustion issue presented here. It exacerbates the disarray among the circuits about the proper application of the exhaustion doctrine and the impact of Section 10(c).

Moreover, the circuit court's decision conflicts with two decisions of this Court. It is inconsistent with this Court's opinion in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-85 (1987), which recognized that Section 10(c) relieves parties from any requirement to petition an agency for rehearing before seeking judicial review. The circuit court's ruling also is directly at odds with this Court's decision in the pre-APA case of *Levers v. Anderson*, 326 U.S. 219 (1945), which held that a litigant need not exhaust an administrative remedy that is permissive in nature.

Finally, the Fourth Circuit's decision is unsound as a matter of policy. "[T]he general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts," *McCarthy v. Madigan*, —— U.S. at ——, 112 S.Ct. at 1086, makes sense only if the "prescribed" remedies—and the obligation to pursue them—are spelled out in advance for all to see. In contrast, the Fourth Circuit's "rule of judicial administration" fosters obscure agency procedures, confusion among litigants and courts attempting to comply with the exhaustion requirement, sandbag litigation tactics, and arbitrary results when the judicial "rule" is applied.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION PATENTLY VIOLATES SECTION 10(c) OF THE ADMINISTRATIVE PROCEDURE ACT

Only last term, this Court emphasized that the exhaustion doctrine is subordinate to Congress' fundamental authority to prescribe the jurisdiction of federal courts.

> [A]ppropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.

McCarthy v. Madigan, —— U.S. at ——, 112 S.Ct. at 1086. The task of defining the jurisdiction of federal courts is entrusted to the Congress by the Constitution, *Palmore v. United States*, 411 U.S. 389, 400-01 (1973), and federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *McCarthy v. Madigan*, —— U.S. at ——, 112 S.Ct. at 1087 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). Therefore, courts must not decline the exercise of jurisdiction pursuant to the exhaustion doctrine unless it is consistent with congressional intent. *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 579-580 (1989).

The preeminent expression of congressional policy regarding judicial review of administrative action is the APA. Congress enacted the APA to provide a general authorization for review of agency action in the district courts. *Bowen v. Massachusetts*, 487 U.S at 903.

> The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation.

Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967) (footnote omitted) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

In enacting the APA, Congress dealt explicitly with the issue and exhaustion of administrative remedies. It provided in Section 10(c) that:

> Agency action made reviewable by statute and *final agency action for which there is no other adequate remedy in a court are subject to judicial review.* A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. *Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section* whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, *unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.*

5 U.S.C. § 704 (emphasis added).

"[T]he primary thrust of § 704 was to codify the exhaustion requirement." *Bowen v. Massachusetts*, 487 U.S. at 903. The statute clearly provides that exhaustion of intra-agency appeals is not a prerequisite to judicial review under the APA except to the extent that other statutes or appropriate agency rules command otherwise. *See* 4 Kenneth C. Davis, *Administrative Law Treatise* § 26.12, at 470 (2d ed. 1983); *New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Comm'n*, 582 F.2d 87, 99 (1st Cir. 1978). This provision must be construed and enforced according to its plain terms. *See generally Connecticut Nat'l Bank v. Germain*, —— U.S. ——, ——, 112 S.Ct. 1146, 1149 (1992); *Hallstrom v. Tillamook County*, 493 US. 20, 24-31 (1989); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

Moreover, the legislative history of the APA leaves no doubt that Section 10(c) means exactly what it says. While the legislation was pending before Congress, the Department of Justice submitted to both the Senate and House Committees on the Judiciary a detailed analysis of the statute. It summarized Section 10(c) in the following terms:

> Section 10(c): This subsection states (subject to the provisions of section 10(a)) the acts which are reviewable under section 10. It is intended to state existing law. *The last sentence makes it clear that the doctrine of exhaustion of administrative remedies with respect to finality of agency action is intended to be applicable only (1) where expressly required by statute (as, for example, is provided in 49 U.S.C. 17(9)), or (2) where the agency's rules require that decisions by subordinate officers must be appealed to superior agency authority before the decision may be regarded as final for purposes of judicial review.*

S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* Senate Judiciary Comm., 79th Cong., 2d Sess., *Administrative Procedure Act: Legislative History, 79th Congress*, at 185, 230 (Comm. Print 1946) ("APA Leg. Hist.") (emphasis added); *see also Samuel B. Franklin & Co. v. SEC*, 290 F.2d 719, 724 (9th Cir.), *cert. denied*, 368 U.S. 889 (1961) (discussing this legislative history).

The Senate Judiciary Committee's report on the APA includes the following discussion of Section 10(c):

> The last clause, permitting agencies to *require by rule* that an appeal be taken to superior agency authority before judicial review may be sought, is designed to implement the provisions of section 8(a). Pursuant to that subsection an agency may permit an examiner to make the initial decision in a case. which becomes the agency's decision in the absence of an appeal to or review by the agency. If there is such review or appeal, the examiner's initial decision becomes inoperative until the agency determines the matter. For that reason *this subsection permits an agency* also *to require by rule that, if any party is not satisfied with the initial decision of a subordinate hearing officer, the party must first appeal to the agency (the decision meanwhile being inoperative) before resorting to the courts. In no case may appeal to "superior agency authority" be required by rule unless the administrative decision meanwhile is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency action and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue "exhausting" administrative processes after administrative action has become, and while it remains, effective.*

S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* APA Leg. Hist. at 185, 213 (emphasis added). The House Judiciary Committee report contains a virtually identical description of Section 10(c). H. Rep. No. 1980, 79th Cong., 2d Sess. (1946), *reprinted in* APA Leg. Hist. at 233, 277.

Finally, this construction of Section 10(c) is confirmed by the Government's own most authoritative interpretation of the APA, the 1947 *Attorney General's Manual on the Administrative Procedure Act*, which this Court has repeatedly given great weight. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring). That manual discusses the import of Section 10(c) in the following terms:

> The last clause of section 10(c) permits an agency to require *by rule* that in such cases parties who are dissatisfied with the "initial" decisons of hearing officers must appeal to the agency before seeking judicial review, but only if the agency further provides that the hearing officers' decisions shall be inoperative pending such administrative appeals.

Attorney General's Manual on the Administrative Procedure Act 104 (1947) (emphasis in the original).

Thus, the logic and the command of Section 10(c) are clear and simple. On one hand, it freely permits an agency (by appropriate rule) or Congress (by statute) to require exhaustion of intra-agency appeals. Conversely, absent the imposition of such a requirement, it provides a litigant aggrieved by a final agency decision with the right to seek immediate relief in federal court under the APA.

There is nothing novel in this codification of the exhaustion doctrine. The essence of that doctrine has always been that "no one is entitled to judicial relief for a supposed or threatened injury until the *prescribed* administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (emphasis added). Section 10(c) simply ordains which administrative remedies will be considered "prescribed" for exhaustion purposes.[8]

Significantly, Section 10(c) mandates that exhaustion requirements shall be spelled out for all to see. It thereby implements the overarching purpose of the APA—to curb arbitrary agency action, to promote the rule of law, and to avoid situations where parties before agencies are subject to procedural pitfalls and unfair surprises. Moreover, the statute's insistence upon clear procedural ground rules was fully consonant with existing law. Shortly before the enactment of the APA, this Court had refused to require exhaustion of an administrative rem-

[8] While Section 10(c) resolves the exhaustion issue in many cases, including this one, it does not completely supplant the judicially developed exhaustion doctrine. For example, Justice White noted, in *McKart v. United States*, 395 U.S. 185, 207 n.2 (1969) (White, J., concurring in result), that the administration of the military draft laws is not covered by the APA, and so the need to exhaust agency remedies in that case was governed by the judicial exhaustion doctrine rather than by Section 10(c).

edy where the applicable regulations did not expressly provide that pursuit of the remedy was a precondition to judicial review. *Levers v. Anderson*, 326 U.S. 219 (1945).

In this case, HUD is seeking to get through litigation what it never got through rulemaking—a mandatory exhaustion requirement. The agency easily could have imposed an exhaustion requirement by regulation, in conformance with Section 10(c). The agency having failed to do so, the government importuned the Fourth Circuit to impose a judicial exhaustion requirement retroactively and in blatant contravention of Section 10(c).

Mr. Darby, for his part, complied with the letter and the spirit of the APA. He diligently pursued his administrative remedies at HUD for almost an entire year—enduring the contested sanctions all the while—before turning to the district court for redress. He sought judicial review only after a full factual record had been created before the agency and after a detailed decision had been rendered by the agency—a decision that was final according to HUD's own regulations. No statute or regulation required any further exhaustion of administrative remedies. Consequently, under Section 10(c) of the APA, Mr. Darby had an absolute right to seek relief in the district court at that juncture.

The "rule of judicial administration" which the circuit court propounded to divest the district court of jurisdiction and deny Mr. Darby relief subverts Section 10(c). It accomplishes exactly what Congress sought to proscribe—it subjects Mr. Darby to the agency sanction and to repetitious administrative process without recourse, thereby enshrining the "fundamental inconsistency" of requiring continued "exhaustion" of agency processes while the administrative action remains effective.[9] Moreover, as ap-

[9] HUD may deny that there is any such fundamental inconsistency here, because its "regulations provide that the ALJ's decision is inoperative pending review by the Secretary." *See* Br. in Opp. 9 n.5. However, such an argument elevates form over sub-

plied in this case, the circuit court's "rule" operated to deprive Mr. Darby of any right to judicial review whatsoever. Not only is such a rule unfair and unsound but, more importantly, it is a judicial usurpation of legislative authority.

II. THE FOURTH CIRCUIT'S DECISION IS IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS AND APPLICABLE DECISIONS OF THIS COURT

Section 10(c) frequently has been overlooked by federal courts, thereby creating needless and detrimental complexity in the application of the exhaustion doctrine. *See* 4 Kenneth C. Davis, *Administrative Law Treatise* § 26.12, at 468 (2d ed. 1983). This Court recently repeated Professor Davis' complaint that Section 10(c) "has been almost completely ignored in judicial opinions." *Bowen v. Massachusetts*, 487 U.S. at 902 (1988).

Nonetheless, the majority of federal courts which have addressed the issue have recognized that Section 10(c) governs exhaustion of administrative remdies for purposes of judicial review under the APA, and that it dispenses with any requirement to exhaust intra-agency appeals unless another statute or an appropriate agency rule commands otherwise. *Gulf Oil Corp. v. United States Dep't of Energy*, 663 F.2d 296, 308 n.73 (D.C. Cir. 1981); *New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Comm'n*, 582 F.2d at 99 (1st Cir. 1978); *Mount Sinai Hosp. of Greater Miami v. Weinberger*, 376 F. Supp. 1099, 1124-25 (S.D. Fla. 1974), *rev'd on other grounds*, 517 F.2d 329 (5th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *see also Steere Tank Lines, Inc. v. ICC*, 675 F.2d 763, 766 (5th Cir.

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stance. As explained above, the HUD regulatory scheme subjects a person to administrative sanctions while he contests them before the agency. Therefore, any obligation to pursue an intra-agency appeal as a prerequisite to judicial review effectively subjects the respondent to repetitious administrative process without recourse.

1982). The Fourth Circuit's ruling conflicts with these decisions.

One circuit court has stated that a federal court may impose an exhaustion requirement notwithstanding Section 10(c). *Montgomery v. Rumsfeld*, 572 F.2d 250, 253 n.3 (9th Cir. 1978).[10] Another circuit recently held that judicial discretion controls the resolution of an exhaustion issue and implied that the dictates of Section 10(c) might be outweighed by other considerations in resolving a particular case. *Missouri v. Bowen*, 813 F.2d 864, 870-71 & n.15 (8th Cir. 1987). However, no other federal court has adopted the extreme position taken by the court below—that exhaustion of all available administrative remedies is *always* required as a "rule of judicial administration" unless some exception to the exhaustion doctrine applies.

Furthermore, the Fourth Circuit's decision is inconsistent with applicable decisions of this Court. In *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 284-85 (1987), the Court noted that:

> [Section 10(c)] has long been construed by this and other courts . . . to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review (unless, of course, specifically re-

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[10] In expressing this view, the Ninth Circuit retreated from its previous decision in *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 440, 451-52 (9th Cir. 1971). Ironically, the *Consolidated Mines* decision had garnered widespread scholarly praise for its application of Section 10(c) to resolve the exhaustion issue. *See* Project, *Federal Administrative Law Developments—1971*, 1972 Duke L.J. 115, 298-99 (1972) (*Consolidated Mines* "has finally brought judicial application of the doctrine of exhaustion of administrative remedies into conformity with the mandate of section 10(c)."); 4 Kenneth C. Davis, *Administrative Law Treatise* § 26.12, at 470 (2d ed. 1983) (describing *Consolidated Mines* as the "outstanding" example of a court discovering and following Section 10(c)). Other circuits have ignored the Ninth Circuit's later decision in *Montgomery v. Rumsfeld* and, instead, have cited its earlier decision in *Consolidated Mines*. *See Gulf Oil Corp. v. United States Dep't of Energy*, 663 F.2d at 308 n.73 (D.C. Cir. 1981).

quired to do so by statute—see, *e.g.*, 15 U.S.C. § 717r, 3416(a)) . . .

(emphasis in the original). Section 10(c) equates a petition "for any form of reconsideration" with "an appeal to superior agency authority" insofar as the need for exhaustion is concerned. The only distinction is that Section 10(c) permits an agency to require by rule an appeal to superior agency authority, whereas a petition for reconsideration of rehearing can only be a prerequisite to judicial review if expressly required by statute. Therefore, in the absence of a statutory or regulatory exhaustion requirement, Section 10(c) relieves parties from the obligation to pursue intra-agency appeals just as surely as it relieves them from the need to file petitions for rehearing.

The circuit court's decision also is directly at odds with this Court's decision in the pre-APA case of *Levers v. Anderson*, 326 U.S. 219 (1945). In that case, as here, the government contended that the litigant should have exhausted an administrative remedy which was permissive in nature before seeking judicial relief. The Court rejected this contention, declaring itself unpersuaded that "'may' means must." 326 U.S. at 223. Accordingly, the Court reversed the decision of the circuit court, which had denied judicial review based on the litigant's failure to exhaust that permissive agency remedy.

III. THE FOURTH CIRCUIT'S RULE OF JUDICIAL ADMINISTRATION CREATES PERNICIOUS EFFECTS THAT CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Not only does the circuit court's ruling conflict with Section 10(c), with prior decisions of this Court, and with the decisions of other circuits, it establishes a policy which is the antithesis of the clear, simple and fair exhaustion provision adopted by Congress. Indeed, the Fourth Circuit has manufactured a "rule of judicial administration" that has virulent consequences for all sides.

From the perspective of a person aggrieved by final adverse agency action, this "rule" transforms administrative appeals into a gauntlet that must be run before judicial redress can be sought. Every possible administrative appeal must be pursued upon pain of losing the right to judicial review and perhaps forfeiting any recourse whatsoever. The attendant costs and delays will deter many persons from seeking judicial review and will devalue any relief ultimately awarded those litigants who do manage to stay the course.

From the perspective of government counsel, the novel Fourth Circuit rule is a potent and tempting tactical weapon to wield in APA litigation, which will multiply procedural litigation and divert resources from focus on the merits of agency action. Indeed, it is a virtually ideal sandbag with which to dispose of litigants altogether by raising the exhaustion issue in federal court after the time limit for any administrative appeal has expired.

From the agency's perspective, the circuit court's rule discourages the promulgation of clear rules governing administrative appeals and the need for exhaustion; to the contrary, it creates an incentive for murky procedures that confuse parties and that can be selectively invoked to the agency's tactical advantage. At the same time, it needlessly burdens those agencies that do strive to promulgate clear procedures and that do want to maintain a true discretionary review process. Since the circuit court's rule effectively transforms optional administrative remedies into mandatory ones, those agencies will find their optional appeal procedures being routinely invoked rather than being reserved for use in exceptional cases.

From the perspective of the district courts, this new "rule" will further complicate the resolution of exhaustion issues. Apart from the conflict with Section 10(c), it transforms the exhaustion issue from a doctrine of sound judicial discretion into a formless, unpredictable "rule of judicial administration" with which district courts must comply upon pain of reversal. This rule

usually will be far more difficult to apply than the standards established by Section 10(c). In many cases it may be unclear or debatable whether there exists an available administrative appeal that was not exhausted. And, should the court conclude that an available appeal was not pursued, then it must wrestle with the complexities of whether an exception to the exhaustion doctrine applies.

Judicial review of administrative action has become increasingly important over the years, and constitutes one of the core functions of federal courts in our modern society. The exhaustion principle has a role to play in regulating the exercise of this power of judicial review. Unfortunately, the Fourth Circuit's decision cuts the exhaustion principle loose from its conceptual moorings and transforms it into a hypertechnical "rule of judicial administration" that resembles the discredited common law rules of pleading.

As a matter of sound policy, "the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts," *McCarthy v. Madigan*, —— U.S. at ——, 112 S.Ct. at 1086, makes sense only if the "prescribed" remedies are, in fact, clearly and unmistakably spelled out in advance for all to see. The Fourth Circuit's decision omits this essential element and thereby creates a rule of exhaustion which fosters obscurity, confusion, and arbitrariness.

More fundamentally, the exhaustion principle is subordinate to Congress' constitutional authority to prescribe the jurisdiction of federal courts. Therefore, just as federal courts *must* require exhaustion where Congress so mandates, they *may not* require exhaustion where Congress has expressed a contrary intent. The Fourth Circuit's decision is directly at odds with the express will of Congress as articulated in Section 10(c) of the APA. It derogates from the obligation of federal courts to exercise the jurisdiction given them and, in the case of the

APA, to protect citizens from unlawful and abusive agency actions.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court, granting relief to Mr. Darby, should be affirmed.

Respectfully submitted,

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